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## ESSAY

### THE LAWFULNESS OF SECTION 5 — AND THUS OF SECTION 5

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Few law review articles try to make their central legal argument in their very title — via title words that do not merely describe the argument that will be made in the body of the article, but actually make the basic legal argument, complete with legal reasoning (“and Thus”). But this is such an article.

To unpack, briefly, this title’s (and this article’s) argument: section 5 of the *Voting Rights Act* (VRA) is an obviously appropriate, and thus lawful, congressional enactment pursuant to section 5 of the *Fourteenth Amendment*, which explicitly empowers Congress to “enforce, by appropriate legislation, the provisions of this article” — that is, the Fourteenth Amendment itself. Those who oppose section 5 of the VRA claim that its regime of selective preclearance — whereby certain states with sorry electoral track records must get preapproval from federal officials in order to do things that other states with cleaner electoral track records may do automatically — is not appropriate, not proper, not proportional.<sup>1</sup> But if section 5 of the VRA is unconstitutional, why wasn’t section 5 of the Fourteenth Amendment *itself* unconstitutional? For that section — and indeed every section — of the Fourteenth Amendment was *itself* adopted by a process in which certain states were subject to a kind of selective preclearance. In the very process by which section 5 and the rest of the Fourteenth Amendment were adopted, certain states with sorry electoral track records were obliged to get preapproval from federal officials in order to do things that other states with cleaner electoral track records were allowed to do automatically. But it would be preposterous to say that section 5 of the Fourteenth Amendment was itself illegal. And what is true of section 5 (of the amendment) is true of section 5 (of the VRA). Section 5 (of the VRA) is constitutionally proper, appropriate, and proportional, under the very same constitutional principles that legitimated section 5 (of the Fourteenth Amendment) itself.

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<sup>1</sup> The kindred words “appropriate” and “proper” come directly from the Constitution, U.S. CONST. art. I, § 8, cl. 18; *id.* amend. XIV, § 5; their cousin “proportional” comes from judicial doctrine construing the Constitution, *see* *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

In short, any serious constitutional analysis of the special preclearance system of the Voting Rights Act must come to grips with the special preclearance system that generated the Fourteenth Amendment itself in the 1860s. Between 1865 and 1868, states with abysmal track records of rights-enforcement and democratically deficient voting rules were not allowed back into Congress to sit alongside states with minimally acceptable track records, and these same democratically deficient states were also not allowed to resume full powers of state self-governance enjoyed by their nondeficient sister states. Instead, states with sorry track records were required to submit new state constitutions for federal preapproval/preclearance, and were also required to ratify the Fourteenth Amendment itself.<sup>2</sup> Other states, by contrast, were not subject to these special federal preclearance requirements. Although many critics of Congress's actions in the 1860s loudly objected, in the name of states' rights and state equality, to this highly visible system of selective preclearance, the Reconstruction Congress successfully defended its actions as a proper federal enforcement of the Article IV Republican Government Clause<sup>3</sup> — the very clause that today's states' rights critics of the VRA have tried to invoke, with unintended but astonishing irony, against the VRA!<sup>4</sup> Whatever the clause may have meant to the Founding generation — a question that has generated a range of scholarly views — it is uncontested that the Republican Government Clause was the explicit and widely publicized legal basis for Reconstruction itself, and for the specific regime of selective preclearance that was undeniably part of the very process by which the Fourteenth Amendment (and also the Fifteenth Amendment) became part of the Constitution.<sup>5</sup> Modern interpreters of the Republican Government Clause must thus take account of how this clause was powerfully and publicly glossed by the Reconstruction Amendments themselves — in particular, by the process by which these amendments sprang to life, with the repeated and well-informed endorsement of the American people in a series of watershed elections that culminated in an emphatically Reconstructed Constitution.

A quick confession before I unfold my argument in more detail. Though my title highlights section 5 of the Fourteenth Amendment — the section that explicitly empowers Congress to pass laws such as the

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<sup>2</sup> For specifics, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 364–80 (2005).

<sup>3</sup> See *id.*; see also AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 79–88 (2012) [hereinafter AUC].

<sup>4</sup> The Supreme Court's certiorari grant in the now-pending *Shelby County* case explicitly mentions Article IV, meaning of course the Republican Government Clause. *Shelby Cnty. v. Holder*, 133 S. Ct. 594, 594 (2012).

<sup>5</sup> See AUC, *supra* note 3, at 79–88, and sources cited therein.

VRA — my true story of the process by which this section sprang to life is also equally true of the process by which other sections of the Fourteenth Amendment — and indeed both sections of the Fifteenth Amendment — came to life. Indeed, in this article I shall show how various words and principles evident in other sections of the Fourteenth and Fifteenth Amendments strongly reinforce the broad sweep of section 5 of the Fourteenth, and the obvious permissibility of the VRA's selective preclearance regime. So perhaps an alternative title making my argument more completely would have been “The Lawfulness of the Reconstruction Amendments — and Thus of the Voting Rights Act.” But that title wouldn't have been quite as fun, would it?<sup>6</sup>

### I. RECONSTRUCTION AND THE REPUBLICAN GOVERNMENT CLAUSE

The Fourteenth Amendment was proposed in 1866 by the Thirty-Ninth Congress, a Congress that famously refused at the outset to seat Senators and Representatives from the eleven states that had unsuccessfully attempted to secede from the Union several years earlier. These ex-gray states were not allowed to return to their usual seats in Congress, and were not allowed to resume all the ordinary powers of state governments, until they met certain conditions laid down by the federal government in a series of Reconstruction Acts inextricably intertwined with the enactment of the Fourteenth Amendment itself. First, each ex-gray state<sup>7</sup> was obliged to submit a new state constitution for federal approval, a constitution in which the state not only was required to establish a race-neutral voting system, but also was made to promise to maintain this race-neutral suffrage regime forever thereafter, as a fundamental and irrevocable condition of readmission to Congress. As an additional condition of readmission, each ex-gray state was required to ratify the then-pending Fourteenth,<sup>8</sup>

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<sup>6</sup> In addition to the various arguments I shall make about the enactment of the Reconstruction Amendments in the 1860s, and the obvious relevance of this enactment experience for the VRA, I shall also present an entirely separate and independent argument based on an amendment adopted after the VRA — namely, the Twenty-Sixth Amendment, which echoed and blessed the letter and spirit of the VRA itself and in the process overruled a Supreme Court case that had more narrowly construed congressional power to guarantee and enforce voting rights. Thus, this Article argues that the VRA today is constitutionally undergirded by no fewer than four constitutional provisions: the Article IV Republican Government Clause, section 5 of the Fourteenth Amendment, section 2 of the Fifteenth Amendment, and the overall Congress-empowering, voting-rights-protective, VRA-blessing spirit of the Twenty-Sixth Amendment.

<sup>7</sup> Tennessee presented a special case, and the very fact that the Reconstruction Congress treated Tennessee differently reinforces the conclusion that Congress enjoys important line-drawing power in enforcing the basic principles of republican government. For details, see AMAR, *supra* note 2, at 603 n.35.

<sup>8</sup> See First Reconstruction Act, ch. 153, 14 Stat. 428 (1867); An Act to Admit the State of Arkansas to Representation in Congress, ch. 69, 15 Stat. 72 (1868); An Act to Admit the States of

which was officially considered ratified only after various ex-gray states acceded to this congressionally imposed requirement.

Northern states, by contrast, were not required by Congress to ratify the Fourteenth Amendment in order to retain their seats in Congress. Nor were Northern states required in this time period — the mid-1860s, to be precise — to have race-neutral suffrage laws, much less to constitutionalize race-neutrality in voting as a fundamental element not subject to the possibility of future state modification.

In short, the Fourteenth Amendment itself became part of our Constitution thanks to a congressional system (that is, a *statutory* system) of *selective preclearance*, in which some states but not others were required to jump through tight federal hoops because of their bad democratic track records in the preceding years. To be clear: the system of selective preclearance that formed part of the adoption of the Fourteenth Amendment was decisively codified in various landmark Reconstruction statutes — statutes that were in effect poetically echoed by the later 1965 Voting Rights Act and its subsequent iterations.

Soon after the enactment of the Fourteenth Amendment, similar procedures were followed in the enactment of the Fifteenth Amendment. States with dismal democratic track records — in particular, the handful of especially recalcitrant Southern states that had refused to respect black voting rights and to ratify the Fourteenth Amendment in the late 1860s — were obliged to ratify the Fifteenth Amendment, and to forever commit themselves to a system of public schools, before they were allowed back in Congress and allowed to resume their full rights as proper self-governing republican states.<sup>9</sup> Once again, these special statutory requirements were imposed only on some states and not others — in particular, on states with the worst track records of voting inequality in the years leading up to the Fifteenth Amendment.

As Senator Charles Sumner, Representative John Bingham, and other notable Reconstruction leaders explained in great detail on the congressional floor, in speeches widely covered by the press at the time, the Republican Government Clause provided the legal foundation for the Reconstruction Congress's actions.<sup>10</sup> At a certain point, states with abysmal track records could be deemed unrepublican within the meaning of Article IV, and Congress had broad powers to en-

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North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress, ch. 70, 15 Stat. 73 (1868).

<sup>9</sup> See An Act to Admit the State of Virginia to Representation in the Congress of the United States, ch. 10, 16 Stat. 62 (1870); An Act to Admit the State of Mississippi to Representation in the Congress of the United States, ch. 19, 16 Stat. 67 (1870); An Act to Admit the State of Texas to Representation in the Congress of the United States, ch. 39, 16 Stat. 80 (1870).

<sup>10</sup> See AUC, *supra* note 3, at 79–88, and sources cited therein; see also Akhil Reed Amar, Lindsey Ohlsson Worth & Joshua Alexander Geltzer, *Reconstructing the Republic: The Great Transition of the 1860s*, in TRANSITIONS 98 (Austin Sarat ed., 2012).

force that Article's promise of republican government, according to the Court's earlier ruling in *Luther v. Borden*.<sup>11</sup> Congressional Republicans openly admitted that many Northern states also had imperfect track records, but these congressional leaders insisted that Article IV authorized the federal government to draw sensible lines targeting the worst state offenders. In 1866, most Northern states disfranchised blacks, but because free blacks constituted a significantly higher percentage of the population of the former Confederacy, it was not unfair — on the contrary, it was necessary and proper — for Congress to target these worst-offending states and to administer to these states specially strong medicine that limited their previously unfettered and previously abused freedom over voting laws.<sup>12</sup> Similarly, the ex-Confederacy had in the previous decades been far more repressive of free political expression than had other states, so it was not unfair — rather, it was necessary and proper — to specially insist that these states, over and above all other states, ratify the Fourteenth Amendment's provisions protecting free expression (and other rights, of course).

The Reconstruction Republicans' highly visible and expansive use of the Republican Government Clause did not go unnoticed by observers at the time. Opponents cried foul in the name of federalism, states' rights, and equal treatment for all states. But the American people repeatedly and knowingly endorsed the Reconstruction Republicans' sweeping understanding of the Republican Government Clause, both by voting time and again for the Republican sponsors of the Fourteenth and Fifteenth Amendments in the momentous elections of 1866, 1868, and 1870, and also of course by ratifying these amendments with full knowledge of both the strongly nationalist procedures being used by the amendment's sponsors and the vigorous states' rights objections to these procedures.

The sweepingly nationalist reading of the Republican Government Clause championed by Sumner, Bingham, and others had strong roots in antebellum Congressional practice. In effect, the Reconstruction Republicans aimed to treat the postbellum South in much the same way that the earlier Congresses had treated the antebellum West.<sup>13</sup> Western territories seeking statehood had been required to establish their republican bona fides before they would be admitted to the Union as proper republican states in good standing. Unfair elections could doom a Western territory's admission request — as had happened in Bleeding Kansas. In 1866, the South was in much the same

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<sup>11</sup> 48 U.S. (7 How.) 1, 42 (1849).

<sup>12</sup> AMAR, *supra* note 2, at 374–76, and sources cited therein.

<sup>13</sup> See generally Amar, Worth & Geltzer, *supra* note 10.

condition as the antebellum West. Like Bleeding Kansas, postbellum Southern regimes lacked proper republican (small-r) governments and fair elections. In effect, the regimes in the South had, according to the Reconstruction Republicans, reverted to a quasi-territorial status; these jurisdictions were of course part of an indivisible Union (as were all formal federal territories and the District of Columbia), but they lacked the proper republican forms of government necessary for states in good standing. Readmission to Congress for the fallen regimes in this region could properly be conditioned in the same way that admission of Kansas had been conditioned — by requiring these fallen regimes to meet strict national standards that appropriately took account of their past lapses and aimed to insure (that is, to “guarantee,” in the language of Article IV) that henceforth these regimes would indeed be genuine republics with truly fair elections and truly free political discourse.

*This general history of the Fourteenth and Fifteenth Amendments thus supports broad congressional power to administer strong and even selective medicine to individual states with poor democratic track records — the exact sort of medicine employed by section 5 of the Voting Rights Act.* In addition to the sweeping new powers conferred on Congress by the enforcement clauses of the Reconstruction Amendments, modern Congresses also retain the same broad power under the Republican Guarantee Clause to ensure electoral integrity within individual states as was enjoyed by the Reconstruction Congresses themselves. In this respect, the Second Reconstruction that began in the 1960s — with section 5 of the VRA as its centerpiece — has permissibly followed practices and precedents that were constitutionalized in the First Reconstruction of the 1860s. The biggest difference, perhaps, is that the Second Reconstruction has proved a far more enduring success. This is thanks in large part to the VRA itself, as well as to the admirable willingness of the Supreme Court thus far to assist Congress in the Second Reconstruction — in contrast to the Court’s more antagonistic and rather less admirable relationship to the First Reconstruction.<sup>14</sup>

A more careful analysis of the actual text, history, and spirit of the individual sections of the Reconstruction Amendments will buttress the foregoing general history and provide further reasons for treating section 5 of the VRA as constitutionally proper and appropriate — ge-

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<sup>14</sup> For the Court’s disappointing performance in the wake of the First Reconstruction, see, for example, *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United States v. Harris*, 106 U.S. 629 (1883); *The Civil Rights Cases*, 109 U.S. 3 (1883); *James v. Bowman*, 190 U.S. 127 (1903); and *Hodges v. United States*, 203 U.S. 1 (1906).

nuinely proportional to the Constitution's deep principles and promises.

## II. APPROPRIATENESS AND PROPORTIONALITY: A SECTION-BY-SECTION ANALYSIS OF THE FOURTEENTH AMENDMENT

Begin by considering several significant features of section 5 of the Fourteenth Amendment. This is a section written by Congress that explicitly empowers Congress: "Congress shall have power . . ." The particular kind of power that Congress shall have is the power to enact "appropriate" legislation — a word obviously borrowed from *McCulloch*'s famous gloss on the Necessary and Proper Clause of Article I, section 8.<sup>15</sup> That section, it should be recalled, begins in words identical to those echoed by the Reconstruction Congress in the Fourteenth Amendment — "Congress shall have power . . ." — and concludes with a reference to "proper" laws, a close cousin of the word "appropriate." In *McCulloch*, Chief Justice Marshall famously used the word "appropriate" to describe the sorts of laws Congress might enact under the Sweeping Clause of Article I, section 8. In the many years between *McCulloch* and the drafting of the Fourteenth Amendment, no Supreme Court case (with the possible exception of the malodorous *Dred Scott* case) ever used the *McCulloch* test to invalidate a congressional law as inappropriate or improper. Instead, antebellum cases such as *McCulloch* and *Prigg v. Pennsylvania*<sup>16</sup> stood for the proposition that Congress enjoyed wide discretion in discharging the main missions entrusted to the central government.

At the Founding, a central mission was national security, and *McCulloch* gave Congress wide latitude to create a bank that might subserve that central goal. After the Civil War, a central aim of the Fourteenth Amendment was to ensure the basic fairness of state governments as real, functioning democracies; and thus the modern Court should likewise give Congress wide latitude in discharging this function.

Of course, congressional power is not limitless — it must be "proportionate" to the true constitutional principles at issue. Where the Fourteenth Amendment itself does not speak with any specificity about a particular constitutional principle, Supreme Court precedent identifying and defining the principle at issue may provide considera-

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<sup>15</sup> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are *appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (emphasis added). For clear evidence that the Thirty-Ninth Congress had these key words from *McCulloch* in mind when they drafted the Fourteenth Amendment, see CONG. GLOBE, 39TH CONG., 1ST SESS. 1118 (1866) (remarks of Rep. James Wilson).

<sup>16</sup> 41 U.S. (16 Pet.) 539 (1842).

ble guidance, furnishing an important baseline anchoring the proportionality analysis. Thus, when Congress sought to legislate to protect religious liberty — an issue not expressly and specifically addressed by the Fourteenth Amendment — the Court’s rulings on the precise scope of religious liberty loomed large in measuring whether Congress’s effort to safeguard religious liberty was in fact proportionate to the underlying constitutional principle.<sup>17</sup> Ditto when Congress tried to legislate regarding patent law, age discrimination, and disability discrimination<sup>18</sup> — all areas quite far removed from anything expressly and specifically addressed in “the provisions of this article,” that is, the other sections of the Fourteenth Amendment itself, and also quite far removed from the general process by which the Fourteenth Amendment itself was enacted.<sup>19</sup>

By contrast, section 5 of the VRA does indeed address topics quite closely akin to matters explicitly and specifically addressed by “the provisions of this article” — that is, other sections of the Fourteenth Amendment. Thus, these sections themselves are good baselines to anchor the proportionality analysis. Surely a congressional law that has the same kind of proportionality as that featured elsewhere in the Fourteenth Amendment itself should not be condemned as unconstitutionally disproportionate.

Consider for example section 3 of the Fourteenth Amendment. Under this section, government officials who had betrayed their oaths of office in the Civil War were disqualified from future officeholding for the rest of their natural lifetimes. In many cases these disqualifications lasted for decades, despite the disqualified individual’s perfect post-war behavior. These disqualifications did not automatically sunset as time passed. By contrast, the VRA is far gentler with jurisdictions that have misbehaved, and thereby betrayed democratic ideals. Such jurisdictions are not disqualified from legislating on voting rights; they are only monitored closely. And after several years of good behavior, the jurisdiction’s slate is wiped clean, should it so desire. Also, the entire preclearance regime itself periodically sunsets, requiring fresh congressional votes for renewal. Judged by the baseline of section 3, the VRA seems quite tame — miles away from anything genuinely disproportionate.

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<sup>17</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 883 (1990); *City of Boerne v. Flores*, 521 U.S. 507, 532–35 (1997).

<sup>18</sup> *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

<sup>19</sup> Though some may claim that voting discrimination today pales by comparison to the civil rights violations of the Reconstruction era, so too does the discrimination among states pale by comparison to the federal takeover of states at stake in the Reconstruction Acts.



Consider also section 2 of the Fourteenth Amendment, which explicitly speaks of — indeed, which introduces into the Constitution for the first time language regarding — “the right to vote.” When this right is in any way abridged for presumptive voters (a category whose contours are carefully described in section 2), a state is supposed to lose seats in both the House of Representatives and the electoral college. But this apportionment penalty has never been vigorously enforced by courts. Courts lack the statistical knowledge of cumulative voting abridgments and the administrative ability to easily enforce this apportionment penalty,<sup>20</sup> and Congress itself has hesitated to impose the draconian sanction of reduced apportionment on offending states. So Congress, via the VRA, has done something far gentler — something altogether proportionate to the core purposes of the right to vote explicitly set forth in section 2. Precisely because no apportionment penalty has ever been or is ever likely to be assessed, Congress has properly sought to assure that the right to vote for presumptive voters is never abridged! (If it is never abridged, there is no need for any apportionment penalty, and the lack of such a penalty in the real world is altogether unobjectionable.) And section 5 of the VRA is an entirely sound way — a way absolutely proportional to the explicit purposes of section 2 — of achieving this proper constitutional goal.

Section 1 of the Fourteenth Amendment also merits attention, and its opening sentence, conferring citizenship on all those born on American soil, encapsulates two critical lessons for the issue at hand. First, congressional power is not and should not be unlimited. For example, Congress cannot enforce the Fourteenth Amendment by stripping a natural-born American of his citizenship — as a way, for example, of penalizing a state official who misbehaves and deprives others of their constitutional rights.<sup>21</sup> As the first Justice Harlan repeatedly noted, this opening sentence also obliges the federal government, including Congress, to respect the equality of all American citizens; along with the Fifth Amendment’s Due Process Clause, this sentence prevents Congress from treating certain classes of citizens better or worse than other classes.<sup>22</sup>

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<sup>20</sup> See AUC, *supra* note 3, at 188–89.

<sup>21</sup> See *Afroyim v. Rusk*, 387 U.S. 253, 267 (1967).

<sup>22</sup> See *Gibson v. Mississippi*, 162 U.S. 565, 591 (1896) (Harlan, J., delivering the opinion of the Court) (“[T]he Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law.”); *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting) (“The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race.”)

Second, courts should be cautious in deducing and applying unwritten state-equality principles to invalidate congressional statutes. The equal-footing principle — the idea that new states should enter the Union on basically the same terms as the original states and with the same standing — is an important element in the American constitutional tradition, with deep roots in the Northwest Ordinance.<sup>23</sup> But this principle, properly understood, has never prevented Congress from crafting special state-specific rules to deal with unique issues presented when individual jurisdictions have sought to enter — or in the case of the ex-gray Southern states, re-enter — the Union as full-fledged states in good standing.<sup>24</sup> Certain conditions have rightly been condemned as incompatible with proper principles of federalism and state equality. Congress, for example, should not condition a state's admission on a binding state promise to never relocate its capital — an issue properly to be decided by each autonomous state as it sees fit.<sup>25</sup> But as we have seen, Congress can properly require — and in the very process of generating the Fourteenth Amendment did properly require — states with especially sorry democratic track records to meet proper standards tailor-made to address the unique historical lapses of these specific jurisdictions.

How, it might be asked, can these lessons be properly deduced from section 1? Here's how: section 1 was undeniably designed to overrule the infamous *Dred Scott v. Sandford*<sup>26</sup> — in particular, its ruling that free blacks could never be citizens. But of course *Dred Scott* also maddeningly held that Congress could not prohibit slavery in federal territories. This was a preposterous ruling, and one that rightly outraged Abraham Lincoln and antislavery leaders who would eventually champion the Reconstruction amendments. But what was the basis of this preposterous ruling? An extravagant anticongressional theory of state equality. Excluding slavery from the territories, the extravagant argument went, was an offense to state equality because it effectively favored immigration to these territories by free inhabitants of free states at the expense of slaveholding inhabitants of slave states.<sup>27</sup> So in the grip of an overly aggressive state-equality idea, an idea that in more modest form did have real roots in the Northwest Ordinance and

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<sup>23</sup> AUC, *supra* note 3, at 258–59.

<sup>24</sup> For an extremely informative and detailed account of the wide range of special state-specific conditions that have been imposed over the years, consistent with the flexible spirit of the equal-footing doctrine, see generally Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004).

<sup>25</sup> See *Coyle v. Smith*, 221 U.S. 559, 579 (1911).

<sup>26</sup> 60 U.S. (19 How.) 393 (1856).

<sup>27</sup> See *id.* at 514–17.

American ideals, the Supreme Court did violence to the Ordinance's biggest and best idea: federal territory should be free soil.

*Dred Scott* should be a powerful object lesson for today's Court, and section 1 of the Fourteenth Amendment should remind all the Justices that they must take care to avoid the decision's biggest mistakes. In the name of a state-equality idea that does, in suitably modest form, have a proper place in our constitutional order, the Justices should not do violence to our Constitution's biggest and best ideas. One of these ideas is that states should be held to high standards of democracy — especially states with sorry election-law track records — and that post-Reconstruction, Congress must have wide authority to ensure that never again will these states repeat their worst election-law mistakes.

### III. APPROPRIATENESS AND PROPORTIONALITY: THE FIFTEENTH AMENDMENT KICKER

It remains to say a few words about the Fifteenth Amendment, and the manner in which its two sections further buttress the constitutionality of the VRA. Its opening section reiterated and extended the “right to vote” language of the Fourteenth Amendment's second section. With this reiteration, a constitutional pattern began to emerge. Today, via a repeated process of amendments echoing the Fifteenth (which in turn echoed the Fourteenth), no fewer than five separate amendments — the Fourteenth, the Fifteenth, the Nineteenth, the Twenty-Fourth, and the Twenty-Sixth — contain language expressly affirming a “right to vote.” Every single one of these amendments ends with pointed wording empowering Congress in sweeping *McCulloch*-based language to enact “appropriate” enforcement laws. Surely, any sound analysis of constitutional proportionality must attend to the actual and stunning *proportion* of postbellum constitutional texts affirming the link between congressional power and the enforcement of voting rights. Time and again, Americans across the generations have explicitly said, via amendments drafted by Congress and approved by the states, that protecting voting rights is a central mission given to Congress; and each and every one of these amendments has contained express language suggesting that Congress should have a considerable choice of means in discharging its powers, in the emphatic tradition of *McCulloch v. Maryland*.

Which leads, finally, to section 2 of the Fifteenth Amendment. Even if none of the foregoing arguments has persuaded the reader, the VRA can and should be upheld simply and solely on the basis of section 2, giving Congress sweeping power to enact laws aimed at preventing race discrimination in voting.

The Fifteenth Amendment is much more focused than the Fourteenth Amendment, which ranges far beyond voting rights. The Fourteenth speaks expansively of life, liberty, and property, and of unspeci-

fied privileges and immunities. A vast number of laws might be thought to implicate the concerns of this amendment, and in response, the Court in *City of Boerne v. Flores*<sup>28</sup> and its progeny has sought to limit Congress via doctrines of “congruence” and “proportionality.”<sup>29</sup> But the Fifteenth Amendment has a much tighter, more specific concern: voting rights. Even if congressional power in this one domain were virtually plenary, Congress could not, based on this section, claim plenary power over most other areas of life. Precisely because section 2 has obvious built-in limits — it is about voting, not everything else in the world — there is far less need for judges to invent or infer additional limits in order to preserve a proper regulatory space for states.<sup>30</sup> And on the other side of the ledger, there is far more warrant for judges to defer to Congress in the area of voting rights, for the simple reason that time and time and time again the Constitution’s text explicitly links voting rights to the idea of congressional enforcement power.

The Twenty-Sixth Amendment, proposed by Congress in March 1971 and ratified by the states less than four months later (!), is especially notable, enacted as it was in the immediate aftermath of the initial adoption (in 1965) and first renewal (in 1970) of the highly visible Voting Rights Act. Had the states and the American people deemed the VRA constitutionally problematic, why did they so quickly and emphatically agree to an amendment whose wording in section 1 (“the right . . . to vote”) and section 2 (“Congress shall have the power to enforce”) so obviously tracked — and thus blessed — the language of the earlier Fourteenth and Fifteenth Amendments that had been the express constitutional basis for the VRA itself? In ratifying the Twenty-Sixth Amendment, the states and the American people in effect re-ratified the Fourteenth and Fifteenth Amendments as these amendments had been broadly and properly construed in the enactment of the Voting Rights Act itself.<sup>31</sup> (And in the process of ratifying

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<sup>28</sup> 521 U.S. 507 (1997).

<sup>29</sup> *Id.* at 520.

<sup>30</sup> In this respect, section 2 of the Fifteenth Amendment most closely resembles section 2 of the Thirteenth Amendment, under which congressional power has been construed more expansively by the Court than congressional power under section 5 of the Fourteenth Amendment. Compare *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437–44 (1968), with *Boerne*, 521 U.S. at 520. The Court has yet to decide squarely whether *Jones* or *Boerne* provides the better framework for adjudicating the scope of congressional power under the Fifteenth Amendment. Precisely because the Fifteenth Amendment and the Thirteenth Amendment each addresses a rather specific and bounded domain — in contrast to Fourteenth Amendment’s far more sweeping application across the waterfront of imaginable policy space involving unspecified privileges and immunities and all policies implicating life, liberty, and property — *Jones* provides the sounder analogy for proper Fifteenth Amendment doctrine.

<sup>31</sup> *Cf.* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part, joined by Burger, C.J., and by O’Connor and Kennedy, JJ.) (arguing that modern Justices should attend to the significance of the Seventeenth Amendment in considering

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this most recent Right to Vote Amendment, the American people also overruled a closely divided Supreme Court decision, *Oregon v. Mitchell*,<sup>32</sup> that had more narrowly construed congressional power to promote democracy and voting rights for all.)

In sum: If sweeping congressional power to enforce voting rights is somehow unconstitutional, then the Constitution itself is unconstitutional. So perhaps another title of this article might have been “The Constitutionality of the Constitution.”

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whether to stand by state sovereign immunity case law on the books when the Seventeenth Amendment was framed and ratified).

<sup>32</sup> 400 U.S. 112 (1970).